United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 30, 2005

TO : Ronald K. Hooks, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Flextronics Logistics, Inc.
Case 26-CA-22063

512-5012-6712-6700
512-5012-8301
512-5012-8320-5022
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This Section 8(a)(1) access case was submitted for advice as to whether an employer had a sufficient property interest to lawfully attempt to remove a non-employee Union handbiller from the parking area adjacent to its leased premises and to contact the property owner about removing the handbiller.

We conclude that the Employer did not possess a property interest entitling it to exclude individuals from the parking area. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by attempting to evict the Union representative and by contacting the property owner with the object of interfering with Section 7 activity.

FACTS

Flextronics Logistics USA, Inc. (the "Employer") engages in the manufacture, service, repair, and shipping of electronic components equipment. One of its facilities is a 130,000 square-foot building located in the Shelby Oaks Industrial Park in Memphis, Tennessee. The building is surrounded by a paved parking area and can be accessed via a driveway off Shady View Drive, a private road that passes through the industrial park and connects two public streets, Shelby Oaks Drive and Raleigh-LaGrange Road. Signs posted at the entrance to the industrial park inform motor vehicle operators that its parking lots are provided for the use of patrons, customers, or employees of the businesses therein, and that they will be prosecuted if they refuse to leave the property after being asked to leave by persons having the right to use or control the property.

The original lease for the building, dated August 20, 1999, is between Belz Devco GP ("Belz"), which owns the industrial park, and Planet Rx, Inc. Planet RX assigned the lease in two installments to Lightning Logistics LLC ("Lightning"), first on May 10, 2001 for 100,000 square feet and then on August 9, 2001 for the remaining 30,000 square feet. Both assignments were guaranteed by Flextronics International, Ltd., the parent corporation for the Employer. Regarding the relationship between the Employer and Lightning, the Employer asserts that Lightning merged with a subsidiary of the Employer and as of that time, Lightning no longer had any operations of its own. The Employer states that since it began its operations at the Memphis facility in 2001, Lightning has always been a part of the Employer and has always done business under the name "Flextronics."

The only property conveyed in the lease is the 130,000 square-foot building.[1] However, the lease agreement requires Belz to provide areas for parking and other uses, in common with others, together with the right of ingress and egress.[2] Each tenant must pay its proportionate share of Belz's expenses for operating, maintaining, repairing, upgrading, and supervising the industrial park's common areas, which are defined as "landscaping, paving, curbs, walkways, driveways, parking areas, and any other areas not reserved for the use of a single tenant."[3] The lease prohibits the tenant from soliciting or distributing in common areas outside its premises and obligates it to keep the areas adjacent to its leased premises free of trash.[4] Belz must indemnify the tenant for liability to persons or property occurring in the common areas, except when due to the negligence or intentional misconduct of the tenant.[5] Tenants and their employees are required to "park their cars only in the parking area designated for that purpose"

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[1] Industrial Lease Agreement, Part 1 ("Premises").

[2] Exhibit B to Industrial Lease Agreement, Art. 2, § 2 ("Parking, Etc.").

[3] Id., Art. 1, § 2(i) ("Common Area Charges"). Each tenant's proportionate share is calculated by dividing the number of square feet in its leased building by the number of square feet in all the buildings within the industrial park. Id., § 2(v) ("Tenant's Proportionate Share").

[4] Id., Art. 2, § 4 ("Additional Tenant Covenants").

[5] Id., Art. 5, § 6 ("Hold Harmless and Indemnification"); Rider to Exhibit B, ¶ 11.

by Belz, and are prohibited from parking in a manner that obstructs fire lanes or interferes with the rights of Belz and other tenants to egress, ingress, and loading.[6]

On April 7, 2005,[7] an organizer ("Union Representative") for the Industrial Division of the Communications Workers (the "Union") arrived at the Employer's facility and parked his vehicle in the adjacent parking lot.[8] The Union Representative exited his car and stood near the employee entrance as cars arrived, distributing leaflets to employees as they drove through the entrance.[9] The leaflets encouraged employees to vote "yes" in an upcoming representation election scheduled for April 21.[10] After about 10 minutes, an Employer security guard asked the Union Representative to leave the premises and threatened to call the police if he did not. The Union Representative refused to leave and continued handbilling. The Employer then contacted representatives of Belz and informed them of the Union Representative's handbilling activity and his refusal to leave the premises. Minutes later, a security guard for the industrial park arrived. She stated that Belz wanted him to leave and threatened to call the police if he did not. The Union Representative again refused to leave. About one hour later, a Belz representative approached and told the Union Representative that the company wanted him to leave the premises and threatened to call the police if he did not. When the Union Representative still did not leave, Belz contacted the police and reported a trespass. When the police soon arrived and instructed the Union Representative to leave, he finally departed.

The election scheduled for April 21 was blocked by the instant charge and another charge, in Case 26-CA-22056,

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[6] Id., Art. 22 ("Rules and Regulations"), § ix.

[7] All dates are in 2005 unless otherwise indicated.

[8] The Union Representative states that he arrived at about 2:30 p.m., that the Employer had a shift starting at 3:00 p.m., and that another shift ended and started at 3:30 p.m.

[9] The Union Representative was wearing a Union t-shirt at the time. He was not employed by the Employer or Belz.

[10] The Union's representation petition in Case 26-RC-8468 seeks to represent a unit of about 325 of the Employer's production and shipping and receiving employees.

alleging that the Employer unlawfully interrogated its employees.[11]

ACTION

We conclude that the Employer did not possess a property interest entitling it to exclude individuals from the parking area, because: (1) the Employer is not a party to the lease; (2) even assuming the Employer could exercise the rights and obligations under the lease, it had only a nonexclusive easement in the parking area with which the Union Representative did not interfere; and (3) the Tennessee motor-vehicle trespass statute upon which the Employer relies is inapplicable. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by attempting to evict the Union Representative and by contacting Belz with the object of interfering with Section 7 activity.

Except in limited circumstances, an employer may nondiscriminatorily deny the use of its private property to non-employee union representatives who wish to handbill the employer's employees for organizational purposes.[12] However, the employer has the threshold burden to establish that it possesses a property interest entitling it to exclude others from the property.[13] In determining whether an adequate property interest has been shown, the Board construes relevant state law and examines relevant documentary and other evidence.[14] If the employer lacks an exclusory property interest, it violates 8(a)(1) not only by directly interfering with nonemployee Section 7 activity on the property, but also through indirect interference, e.g. informing the property-owner with the object of interfering with the activity.[15]

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[11] The Region found that the charge in Case 26-CA-22056 has merit. The Union also filed a charge in Case 26-CA-22057, alleging that Belz unlawfully attempted to evict the Union Representative from the parking lot and unlawfully contacted the police. The Region dismissed the charge.

[12] Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

[13] Food For Less, 318 NLRB 646, 649 (1995), enfd. in pertinent part 95 F.3d 733 (8th Cir. 1996).

[14] Ibid.

[15] Wild Oats Community Markets, 336 NLRB 179, 181-82 (2001); Best Yet Market, 339 NLRB 860, 864 (2003).

Initially, the Employer has not shown that it has the authority to exercise Lightning's rights and obligations under the lease. While Lightning and the Employer are related companies, the Board regards separate corporate subsidiaries and even unincorporated divisions of a corporation as separate persons under the Act if neither the parent nor the subsidiary "exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other."[16] If the Employer cannot show that it is, in effect, the same entity as Lightning, or that it is Lightning's agent, then it would have no property interest whatsoever in the building or any other part of the industrial park. In that case, the Employer violated Section 8(a)(1) without further analysis. For purposes of this analysis, however, we assume that the Employer can exercise the rights and obligations under the lease.

Second, the Board generally finds that an employer's nonexclusive right to use another's property does not constitute a property interest entitling it to exclude nonemployees from that property.[17] The Board's decisions are consistent with Tennessee law, which classifies an easement as an interest in property that confers on its holder a legally enforceable right to use another's property for a specific purpose.[18] The extent of an easement holder's rights under Tennessee law depends on the terms of the grant.[19] While an easement holder may use the

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[16] Los Angeles Newspaper Guild Local 69 (Hearst Corp.), 185 NLRB 303, 304 (1970).

[17] See, e.g., Food For Less, 318 NLRB at 650 (lease granting employer mutual, non-exclusive easement held in common with other shopping-center tenants for ingress, egress, and parking, did not establish exclusory property interest); Giant Food Stores, 295 NLRB 330, 332-333 (1989) (lease granting employer nonexclusive right to use shopping-center common areas, including sidewalk and parking lot, did not establish exclusory property interest); Polly Drummond Thriftway, 292 NLRB 331, 332-333 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989) (lease and sublease granting employer nonexclusive right to use sidewalk adjacent to store, in common with other shopping-center occupants, did not establish exclusory property interest).

[18] Hall v. Pippin, 984 S.W.2d 617, 620 (Tenn.Ct.App. 1998); Pevear v. Hunt, 924 S.W.2d 114, 115 (Tenn.Ct.App. 1996).

[19] Foshee v. Brigman, 129 S.W.2d 207, 208 (Tenn. 1939).

premises, it has no right to exclude others unless they interfere with its easement privilege.[20]

Applying the above principles, the Employer's property interest in the parking area outside its leased building is a non-exclusive easement for ingress, egress, and parking. Thus, the lease grants the Employer the right to use areas of the industrial park for parking and other uses, in common with others, as well as the right of ingress to and egress from its leased premises. The lease defines "common areas" as landscaping, paving, curbs, walkways, driveways, parking areas, and any other areas not reserved for the use of a single tenant. The property where the Union Representative was handbilling is clearly a "common area," over which Belz has ultimate control, under the lease.

We reject the Employer's contention that it possesses the exclusive right to use the parking area outside its building. Although the Board has implied that a lease provision granting an employer "exclusive use and control" of a portion of a shopping-center common area would constitute a property interest sufficient to lawfully exclude nonemployee handbillers,[21] the Employer has not provided any documentary evidence to contradict the lease language indicating that the parking area is a common area available for use by all the industrial park's tenants.[22]

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[20] Yates v. Metropolitan Government of Nashville and Davidson County, 451 S.W.2d 437, 441 (Tenn.Ct.App. 1969).

[21] Giant Food Stores, 295 NLRB at 332 n.8. The Board ultimately found that the employer lacked a sufficient property interest to lawfully exclude the handbillers, notwithstanding this language in the lease, because, inter alia, the evidence did not indicate the precise location within the common area where the employer would have exclusive use and control. Ibid.

[22] The lease provision requiring tenants and their employees to park their cars only in the parking areas "designated" for that purpose does not support the Employer's position that it has the exclusive right to use the parking area adjacent to its building. To the contrary, the purpose of the provision is clearly to prevent parking in fire lanes, loading areas, driveways, and other non-parking spaces, rather than enhancing tenants' property rights. We would also reject any contention that the lease's prohibition on tenant solicitation or distribution of literature in common areas gives the Employer the right or obligation to prevent such conduct by third parties. Great American, 322 NLRB 17, 23 (1996) (provision requiring tenants to cause their concessionaires, invitees, and licensees to abide by owner's

Rather, the Employer's claim of enhanced property rights in the parking area adjacent to its building is based on a payment it allegedly made to Belz for additional parking spaces and its alleged history of control and supervision there. Specifically, the Employer asserts that Belz charged it, but no other tenants, the amount of $27,000 from its "tenant improvement budget" for the creation of additional parking spaces near its building. However, such additional parking spaces would not necessarily be reserved exclusively for the Employer's use,[23] and, in any event, there is no evidence or contention that the Union Representative was handbilling from any of those additional parking spaces when he was threatened with eviction and prosecution.[24] The Employer also asserts that it has established and enforced traffic rules in the parking area and that its security guards patrol the area. However, the Board has found similar conduct to be insufficient to transform an easement interest into a more substantial property right providing the legitimate power to expel.[25]

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rules regarding use of common areas did not convey a property interest permitting exclusion of nonemployee union handbillers who come within none of the listed categories, where lease agreement merely granted tenants nonexclusive right to use common areas).

[23] Cf. Johnson & Hardin Co., 305 NLRB 690, 691, 695 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995) (employer lacked exclusory property interest in driveway – an easement over state-owned land – even though employer had elected to pave, maintain, and beautify the area at its own expense and otherwise acted as though it were the owner).

[24] Giant Food Stores, 295 NLRB at 332 n.8.

[25] Food For Less, 318 NLRB at 650 (nonexclusive easement in shopping-center common areas not transformed into exclusory property interest by mere facts that employer repaired and maintained parking lot and maintained insurance coverage); Mr. Z's Food Mart, 325 NLRB 871, 871 n.2, 883-84 (1998), enf. denied in pertinent part 265 F.3d 239 (4th Cir. 2001) (nonexclusive easement in shopping-center common areas not transformed into exclusory property interest by mere facts that employer maintained liability insurance coverage, patrolled common areas, expelled skateboarders, and used common-area sidewalk to store carts and conduct business without owner's objection); Johnson & Hardin Co., 305 NLRB at 691, 695 (nonexclusive easement in driveway on state-owned land not transformed into exclusory property interest, even though employer had elected to pave, maintain, and beautify the area at its own expense and otherwise acted as though it were the owner). Target Stores, 300 NLRB 964

Finally, Belz has not taken the position that the Employer had an exclusory interest in the parking lot.[26]

We further conclude that the Union Representative's handbilling did not "interfere" with the Employer's nonexclusive easement to such an extent that it could lawfully evict him. In this regard, the Board has found that brief delays to employee cars for receiving leaflets was not interference sufficient to justify the handbiller's eviction from the premises.[27] Here, there is no assertion, much less evidence, that the handbilling caused traffic delays, caused employees to be late for their shifts, or otherwise hindered the Employer's conduct of business.[28]

(1990), does not mandate a different result. In affirming the ALJ's decision, the Board emphasized that no exceptions had been filed on the ALJ's finding that the employer had an exclusory property interest in front of its store, even though the sidewalk and parking lot were for the common use of all shopping-center tenants, because the employer maintained, policed, and used the area in front of its store and had a long history of repeated enforcement of its own no-solicitation policy without objection of the lessor. Id. at 964 n.2, 969.

[26] Although Belz's position statement in Case 26-CA-22057 states that the handbilling occurred on property "dedicated to the use of Flextronics," it is apparent, when read in context, that Belz was attempting to defend its eviction of the Union Representative by informing the Region that the parking area was intended to be used by tenants such as Flextronics and their invitees, rather than the Union Representative, who it considered a trespasser.

[27] Johnson & Hardin Co., 305 NLRB at 691 & n.11, 695 (handbilling in question posed minimal, if any, interference with employer's right to use easement for ingress and egress where employees merely stopped their vehicles, accepted proffered literature, and resumed driving). See also Best Yet Market, 339 NLRB at 863 (no evidence that handbilling or picketing interfered with employer's conduct of business or with anyone's ingress to or egress from store); Mr. Z's Food Mart, 325 NLRB at 884 n.30 (no evidence organizers obstructed right of customers to freely use sidewalk or adjacent parking lot or to enter or exit stores); Food For Less, 318 NLRB at 650 n.7 (employer failed to demonstrate that handbilling obstructed ingress, egress, or parking).

[28] Compare Great American, 322 NLRB at 21 (even though employer lacked exclusory property interest in parking lot, employer lawfully summoned police to evict handbillers because they were interfering with vehicular traffic

Third, we reject the Employer's contention that a state criminal trespass statute granted it the right to exclude the Union Representative from the parking lot, because the particular statute cited by the Employer only applies to trespasses by the operation or parking of motor vehicles.[29] The Union Representative parked his car in the lot, but was distributing leaflets while standing outside his car when the Employer attempted to evict him. We have not found any Tennessee cases applying the motor-vehicle trespass statute to pedestrians, i.e., individuals who are not actually operating motor vehicles. Regarding Tennessee's general criminal trespass statute, which does apply to pedestrians, a trespass occurs only if a person enters the property of the owner with knowledge they do not have the owner's consent to enter.[30] The statute does not grant non-owners the right to evict anyone, unless they are acting as the owner's agent.[31]

For the reasons discussed above, the Employer did not have an exclusory property interest in the parking area where the Union Representative was handbilling. Accordingly, the Employer violated Section 8(a)(1) by both its direct and indirect interference with Section 7 activity.[32] Regarding indirect interference, the Employer

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entering the lot, causing traffic to back up onto the street, and infringing on the employer's property interest of enabling its customers to have unimpeded entry onto its parking lot).

[29] Tenn.Code Ann. § 39-14-407 (Trespass; motor vehicles).

[30] Tenn.Code Ann. § 39-14-405 (Criminal trespass).

[31] In this regard, there is no evidence that the Employer was acting as Belz's agent in attempting to evict the Union Representative from the parking lot or policing the area generally. The signs posted at entrances to the industrial park are directed at individuals when they are operating or parking motor vehicles, and therefore do not support finding that the Employer had actual or apparent authority to evict pedestrians, such as the Union Representative, from the industrial park on behalf of Belz. See generally, Restatement (Second) of Agency §§ 7, 8 (1958).

[32] Organizational handbilling – the activity the Employer sought to prevent – is clearly protected. Ambrose Electric, 330 NLRB 78, 78 n.3 (1999). There has been no allegation that the Union Representative engaged in any conduct that would remove the protection of the Act.

clearly contacted Belz with the object of interfering with the Union Representative's protected activity.[33] Thus, after asking the Union Representative to leave the parking lot and threatening to call the police, the Employer admits that it "then contacted representatives of the landowner, Belz, and informed them of the handbilling activity and the [Union Representative's] refusal to leave the property." It was only after this contact that Belz asked the Union Representative to leave its property and contacted the police department.[34]

Finally, even though Belz will not permit the Union Representative to handbill in the parking area in the future, a dismissal on noneffectuation grounds would be inappropriate. The Employer's conduct here is not an isolated incident. The Region has also found merit to a charge alleging that the Employer unlawfully interrogated employees, which, like the instant charge, blocks the representation election. Further, there is evidence of impact on employees. The Union Representative has identified at least three employees who voiced considerable concern that the police had been called and that the Union representative was threatened with arrest.

B.J.K.

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[33] Wild Oats Community Markets, 336 NLRB at 181-82; Best Yet Market, 339 NLRB at 864.

[34] Because Belz, and not the Employer, contacted the police to report a trespass, it is unnecessary to analyze this case under Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1982). Cf. Johnson & Hardin Co., 305 NLRB at 690-91.